EMILIO REYES
615 5th Avenue
Chula Vista, CA 91910
Tel: (619) 829-0130
E-mail: emiliotongva@gmail.com

Plaintiff in Pro Se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMILIO REYES, an individual,

Plaintiff,

vs.

DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS; AMY DUTSCHKE in her official capacity as Regional Director of the Bureau of Indian Affairs Pacific Regional Office, and DOES 1-50, inclusive,

Defendants.

Case No.: 5:18-cv-02128 GW (AGRx)

VERIFIED SECOND AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, 5 USC § 702 et. seq.

DEMAND FOR JURY TRIAL

I. PRELIMINARY STATEMENT

1. Plaintiff, EMILIO REYES (hereinafter "Plaintiff"), by and through his attorneys of record herein, brings this Complaint for Injunctive Relief against the above-named Defendants, and in support thereof alleges the following action that seeks to resolve an important debate surrounding the federal regulatory scheme governing relations among Native Americans concerning whether the United States government based solely upon discriminatory and irrational factors may group constituent members into suspect classifications that are derived from records not contained within the federal repository, historic groups of insular minorities that are

the targets of disfavored government treatment because of their fear they might receive federal recognition, if any at all, policies therefore that are unlawful and inconsistent.

2. The Bureau of Indian Affairs (hereinafter "BIA") purposefully (1) denied Plaintiff's application for a Certificate of Degree of Indian or Alaska Native Blood (hereinafter "CDIB"), (2) misclassified Plaintiff, and many others, as belonging to the "Diegueño" [San Diego] Tribe, a non-federally recognized tribe, and (3) refused to acknowledge Plaintiff's Indian blood degree.

3. Plaintiff's ancestors are listed as Gabrielino (State-Recognized) Indians in the records of the BIA. The Gabrielino are historically known as Shoshoneans of Southern California and appear on the California Indian rolls of the Act of May 18, 1928 (45 Stat. L 602), the 1948 amendment of the 1928 Act (62 Stat. 1166), and the 1968 amendment of the 1928 Act (82 Stat. 860 & 861).

4. Instead of issuing a CDIB, the BIA issued a Statement Letter with the incorrect tribal affiliation because that "should be sufficient for your needs." This decision was made notwithstanding other Gabrielino family members have obtained a CDIB from the BIA. This was caused by the disparate-treatment policies of the government because at most, applying defendant's randomness theory.

5. The Department of the Interior (hereinafter "DOI") actions against specifically the Plaintiff are inconsistent, malicious, capricious, discriminatory, in violation of Plaintiff's Constitutional guarantees because certain documents pertaining Plaintiff's tribal affiliation and blood degree belonging to the Gabrielino tribe, were indeed destroyed without proper notice to the Archivist of the United States.

6. Further investigation reveals Mr. Earl Campio, Ms. Angelita Grijalva Abrego, Ms. Stefanie Rodriguez, Mr. Angel Rodriguez Reyes, among others, were issued a CDIB (**Exhibit 1**) listing them as Gabrielino, because of their blood relationship to Maria Ana Grijalva Bega (hereinafter "Mary Grijalva") (**Exhibit 2**).

The United States Supreme Court held "the Equal Protection Clause" requires the government have a legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first place." *Romer v. Evans*, 517 U.S. 620 (1996) 671 F.3d, at 1076, 1095.

7. Although the BIA has consistently issued CDIB's to descendants of Mary Grijalva, the government has refused Plaintiff's numerous requests for similar issuance of certification maintaining that he is ineligible supposedly because "government records show that Mr. Reyes is affiliated with the Diegueño tribe" and "an applicant must show their relationship to an enrolled member of a federally recognized Indian tribe to receive a certification of degree of Indian blood" since apparently the "Bureau of Indian Affairs' policy on issuing certifications of Indian Blood has changed." (**Exhibit 3**).

8. Although Plaintiff is entitled to issuance of a valid CDIB, that CDIB must also show his true Gabrielino identity. (**Exhibit 4**).

9. On April 23, 2018, the BIA issued its final decision for the DOI "because your request lacks sufficient documentary evidence to support a change, it will not be forwarded as originally stated in the February 17, 2016, letter [to the Division of Tribal Government Services in Washington D.C.]" (**Exhibit 5**).

10. On August 13, 2019, the Plaintiff discovered that federal records pertaining to Plaintiff's tribal affiliation were indeed destroyed. A FOIA (BIA-2019-01374) request submitted to the BIA on August 10, 2019 and received on August 16, 2016, revealed the BIA *did not* notify the Archivist of the United States in regards to the alteration, deletion, erasure and destruction of Plaintiff's ancestors tribal affiliation records. (**Exhibit 6**).

11. Indeed, Plaintiff challenges every one of defendant's policies, practices and, procedures that prevents him from obtaining a CDIB stating he is of Gabrielino descent, from DOI, parent agency of the BIA.

12. Plaintiff is informed and believes that Defendants' omissions have

damaged and further caused emotional distress to Plaintiff Reyes. Therefore, Plaintiff is entitled for injunctive relief because a CDIB reflecting the correct tribal affiliation is needed for services guaranteed by Congress and the State of California.

II. PARTY DESIGNATIONS

13. Plaintiff is a resident of San Diego County. Plaintiff descends from the Gabrielino (Tongva) Tribe; a film and history student; and a researcher of Native American Records.

14. Defendant DOI is a cabinet department of the BIA, acting as one of its primary law enforcement agencies that helps administer, maintain, and oversee certain jurisdictional claims pertaining to Native Americans.

15. Defendant Amy Dutschke is a federal official responsible for proper administration of the BIA in California and is the Regional Director of the Pacific Regional Office, responsible for upholding the federal fiduciary relationship over tribal and Indian resources. Ms. Dutschke is therefore sued in her official capacity only.

16. The true names and capacities of Defendant's sued herein as DOES 1 through 50, inclusive, are unknown to Plaintiff, who therefore sues such Defendants by such fictitious names pursuant to Federal Rules of Civil Procedure § 15. Plaintiff alleges that each fictitiously named Defendant acted or failed to act in such a manner that each has contributed in proximately causing the damages to Plaintiff as herein alleged. Plaintiff will seek leave of Court to amend this Complaint to set forth their true names and capacities when ascertained.

17. Plaintiff is informed and believes, and thereon alleges, that each of the Defendants sued herein, including those named herein as Does, are the agents, servants, employees, licensees, guarantees, invitees, or assignees of each other, and in doing the things herein alleged acted within the course and scope of such agency, employment guaranty, assignment, license, invitation and/or relationship and with

the full knowledge and consent of the remaining Defendants.

III. JURISDICTION AND VENUE

18. This action is brought under the Administrative Procedure Act, 5 U.S.C. § 554, 701-706, to compel Defendant, an officer and employee of a United States agency, to perform a duty owed to the Plaintiff and set aside Defendant's final determination which is arbitrary, capricious, nor in accordance with the law, and violates Plaintiff's Constitutional rights to equal protection and due process. Accordingly, this case presents controlling questions of federal law regarding Defendant's duty to issue a CDIB to ensure certain services such as Indian Health Service pursuant 25 U.S.C. § 1679(a)(2), to administer that duty in a consistent manner among similarly-situated of California Indians pursuant 25 U.S.C. § 651 et seq. and to maintain an accurate tribal affiliation and blood degree in the Secretary of the Interior approved California Indian rolls in accordance to 25 U.S.C. § 659.

19. For the foregoing reasons, this Court has jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (action to compel an officer of the U.S. to perform his duty), 5 U.S.C. § 551(4) (interpret and describe law or policy).

20. Venue is proper in the Central District of California under 28 U.S.C. section 1391(e) because Defendant is an officer of the United States acting in his official capacity and under color of legal authority and agency of the United States and because a substantial part of the events or omissions giving rise to the claim occurred in the Central District.

IV. ARGUMENT

21. Public Law 90-507—Sept. 21, 1968 enacted by the Senate and House of Representatives of the United States of America in Congress, states that "The Secretary of the Interior shall prepare a roll of persons of Indian blood who apply for inclusion thereon and (i) whose names or the name of a lineal or collateral relative

appears on any of the approved rolls heretofore prepared pursuant to this subchapter and the amendments thereto or (ii) who can establish, to the satisfaction of the Secretary, lineal or collateral relationship to an Indian who resided in California on June 1, 1852, and (iii) who were born on or before and were living on September 21, 1968."

22. "The roll so prepared shall indicate, as nearly as possible, the group or groups of Indians of California with which the ancestors of each enrollee were affiliated on June 1, 1852. If the affiliation of an enrollee's ancestors on that date is unknown, it shall be presumed to be the same as that of the ancestors' relatives whose affiliation is known unless there is some reason to believe otherwise." 25 U.S.C. § 659(b).

23. Under the Administrative Procedures Act, found at 5 U.S.C. § 551 *et. seq*. and 5 U.S.C. §§ 701 et seq. (the "APA") an agency decision will be set aside if it is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) contrary to constitutional right, power, privilege, or immunity; … (D) without observance of procedure required by law; … 5 U.S.C § 706(2)(A); *see also Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir. 1998) quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-414 (1971).

24. Under 5 U.S.C. 706, the Court should reverse a decision as arbitrary and capricious if the agency, "failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Cascadia Widlands, supra*, 801 F.3d at 1110; quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2009); *accord Motor Veh. Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

25. Accordingly, the Court, "must consider whether the agency's decision was based on a consideration of *relevant* factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)

(emphasis added). "At a minimum, the agency must have considered relevant data an articulated an explanation establishing a 'rational connection between the facts found and the choice made." *Muwekma #3, supra*, 813 F.Supp.2d at 189 quoting *Bowen v. Am. Hosp. Assn.*, 476 610, 626 (1986).

26. "Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action." *Los Angeles v. Shalada*, 192 F.3d 1005, 1021 (D.C. Cir. 1999); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 535 (2007) (E.P.A. action found arbitrary, capricious, and not in accordance with law because E.P.A. offered no reasoned explanation for its action).

27. Disparate treatment of similarly situated parties without adequate explanation is not only a violation of the APA, it is a violation of Constitutional guarantees of equal protection. "Both the Equal Protection Clause and the APA prohibit agencies from treating similarly situated petitioners differently without providing a sufficiently reasoned justification for the disparate treatment." *Muwekma #2, supra*, 452 F.Supp.2d at 115; *see also Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1102-03 (D.C.Cir.2005) ("To prevail on [an] equal protection claim, [a plaintiff must] demonstrate that [it] was treated differently than similarly situated [parties] and that the [agency's] explanation does not satisfy the relevant level of scrutiny.") accord *Pyler v. Doe*, 457 U.S. 202, 216 (1982).

28. The United States Supreme Court held "the Equal Protection Clause requires the government have a legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first place." *Romer v. Evans*, 517 U.S. 620 (1996) 671 F.3d, at 1076, 1095.

29. As the Ninth Circuit has observed, "the equal protection argument can be folded into the APA argument, [where] no suspect class is involved and the only question is whether the defendants' treatment of [the Plaintiff] was rational (i.e., not

arbitrary and capricious)" *Ursack v. Group*, 639 F.3d 949, 955 (9th Cir. 2011) citing *U.S. v. Weston*, 255 F.3d 873, 880 (D.C. Cir. 2001) (describing the rational basis test and the arbitrary and capricious standard as "analogues").

30. Further, Congress has delegated to the Secretary broad power to carry out the federal government's unique responsibilities with respect to Indians. *See Udall v. Littell*, 366 F.2d 688, 672 (D.C.Cir. 1966); CVMT II, 515 F.3d at 1267 (the Secretary "has the power to manage all Indian Affairs, and all matters arising out of Indian relations.") (emphasis in original)(citations omitted). Accordingly, the Regional Director is delegated by the Secretary of the Interior, in the decisions of appeals under her authority pursuant pursuant 25 C.F.R § 2.4(a).

31. In reviewing a complaint, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

V. STATEMENT OF FACTS

A. The Act of 1928, 1948 and 1968

32. Based upon discovery of the 18 "lost treaties" in 1905, a series of efforts were made to address the treaty-less Gabrielino tribe, or at least to compromise its claims to land in Los Angeles County.

33. The California jurisdiction Act of 1928 authorized the California Attorney General to represent the Gabrielino Tribe, among others, and to bring their land claims before the U.S. Court of Claims.

34. The Act of 1928 authorized the Secretary of the Interior to create two census rolls. Roll 1 was the roll of California Indians residing in California on May 18, 1928. For the purpose of the act, the Indians of California were defined as those living in the State on June 1, 1852, and their descendants living in the State on May

18, 1928.

35. Roll 2, authorized by section 7 of the act, was the roll of non-California Indians residing in California on May 18, 1928. No limit on the degree of Indian blood was fixed, and no requirements regarding tribal recognition and the maintenance of tribal relations were established.

36. According to Fred Baker, Examiner of Inheritance of the DOI; 23,000 applicants had filed for enrollment on 11,253 applications. Of these, 10,719 applications were approved, 534 were rejected, and 216 involved in appeals. Of the 10,719 approved applications, about 584 applications were listed on the 1928 California Indian Census Roll as "Unknown Tribe," 97 applications were listed as "Tribe Not Given," 70 applications were listed as "Mission Tribe," and 5 applications were listed as "California Tribe."

37. According to oral histories and as verified in the records of the BIA held at the National Archives (hereinafter "NARA"), the NARA in Washington holds the original 1928 applications. However, 1928 duplicate applications with pre-filled information are held at the NARA in Riverside in box 217 of the "Records Relating to Applications for Identification as a California Indian." It is believed the DOI pre-filled the information on the 1928 applications.

38. As supported in the "Blanket Applications," nos. 10717, 10720, 10609 and 10645, California Indians living on an Indian reservations that refused the 1928 enrollment, were forcefully placed on these Blanket Applications. Other California Indians did not enrolled (filed a 1928 application) because according to BIA correspondence "we feel that when Indians become associated with the white community and take themselves a part of it they lose their identity as Ward Indians and take their place as American citizens without restrictions. The Indians prefer this in many cases, and there is no objection to it in the Indian Service."

39. Upon completion of the 1928 roll, on February 23, 1935, the DOI Commissioner (Assistant Secretary) Mr. John Collier, received notice on

discrepancies in degree of Indian blood between the 1928 reservation census and on the roll of the Act of May 18, 1928. On March 16, 1935, Mr. Collier, agreed that the 1928 reservation census should be changed to agree with 1928 roll.

40. The Court of Claims, in *California Indians v. U.S.* (1941) 98 Ct. Cols, 583, recognized the arguments of the California Attorney General, Earl Warren, that a "promise made to these tribes and bands of Indians and accepted by them but the treaties were never ratified so the promise was never fulfilled."

41. Acting to recognize the equitable 1,553,772 acres of land claims of the Gabrielinos and the additional acres of "all the Indians of California," the Court awarded 7 cents an acre as compensation for the 8.5 million acres of land which was never set up as reservations under the 18 "lost treaties."

42. The Court of Claims awarded no interest for the 94-year period between the signature of the 1851-1953 treaties and payment of the monies in 1944. The Indian Claims Commission addressed the Claims of the Gabrielino Tribe in Docket 80, where the Gabrielino group was treated as an Indian tribe, but only its members were named as Plaintiffs.

43. This legal fiction would appear to a modern lawyer to eviscerate the effectiveness of the land claims settlement, which addressed only the claims of Individual Indians, and not the land claims of the Tribe itself. This would require California Indians to submit a 6-page application to the Regional Office of the BIA, listing almost every applicant as "Mission Tribe."

44. In 1959, the Court of Claims entered a final order recognizing the aboriginal title of the Gabrielino Tribe and other California tribes to 64 million acres west of the Sierra Nevada Range. The tribe's title was recognized and $633 was paid to each Gabrielino in 1972. As part of the efforts to adjudicate the two land claim payments in 1944 and 1972, hundreds of Gabrielino tribal members were recognized as "Gabrielino Indians" on each of the California Indian Rolls of 1928, 1948, and 1968 of the BIA.

45. As a result, the BIA recognizes the Acts for California Indians to issue a CDIB to applicants and the descendants of those listed on the California Indian Rolls of 1928, 1948 and 1968. However, in a Final Determination to Decline to Acknowledge the Muwekma Ohlone Tribe, the DOI; Office of Federal Acknowledgement, declared in its report that the information on the 1928 applications is unreliable and was not fully vetted. *Muwekma*, FD 2002, 15-24.

B. The BIA Erroneously Listed Plaintiff's Ancestor as Diegueño and NOT Gabrielino

46. On February 19, 2013, the Plaintiff submitted a CDIB request. On February 21, 2013, Plaintiff Reyes, received a "statement verifying you are of California Indian Descent that should be sufficient for your needs." A CDIB was denied, instead, a statement letter was provided which included a wrong tribal affiliation and no blood degree.

47. According to federal records, the DOI was unable to issue a CDIB because "you are affiliated with the Diegueno (San Diego) tribe, which is not a federally recognized tribe. This information was found on your Great-Great Grandmother, Mary Bega's 1928 enrollment application… we have prepared a statement verifying you are of California Indian descent that should be sufficient for your needs."

48. Plaintiff's ancestors, Mary Grijalva, application no. 5676 (**Exhibit 7**), Aurelia Grijalva Orosco (hereinafter "Aurelia Grijalva") , application no. 9461 (**Exhibit 8**) and Guillermo Grijalva, application no. 9462 (**Exhibit 9**) appear on the original California Indian Census Roll authorized by Congress in 1928 and approved by the Secretary of the Interior in 1933. Their descendants also appear on the 1948 and 1968 California Indian Rolls.

49. In accordance to the Instructions to Applicants by the Secretary of the Interior, "…the words yes, no, unknown may be used…" (**Exhibit 10**). Mary

Grijalva's tribal affiliation is listed as "Unknown Tribe." However, the applications of full-sister, Aurelia Grijalva, and full-brother, Guillermo Grijalva, are listed as Gabrielino Indians. *See* 25 U.S.C. § 659(b) ("If the affiliation of an enrollee's ancestors on that date is unknown, it shall be presumed to be the same as that of the ancestors' relatives whose affiliation is known unless there is sound reason to believe otherwise").

50. The affidavit of Mary Grijalva's 1928 application shows her thumb print as an alternative to a hand signature, because as many, she could not write. Furthermore, oral history revealed Mary Grijalva did not speak English. Therefore, it remains unclear whether the tribal affiliation and blood degree was in fact decided by Mary Grijalva or by the DOI Examiners of Inheritance. Clearly, the DOI had Mary Grijalva sign her 1928 application without knowing or reviewing its contents.

51. As a result, the BIA has conveniently listed many family members as Gabrielino and others as Diegueño Indians. This is despite the lineage coming from the same parents who are Gabrielino Indians and resided in the counties of Los Angeles, Orange, Santa Barbara, San Bernardino, and Riverside, which are historically known declared the ancestral lands of the Gabrielino.

52. During the final roll of 1968, the BIA hired special agents or Claims Examiners to assign tribal affiliations to descendants of about 756 approved applicants who were listed on the 1928 roll as Unknown Tribe, Tribe Not Given, Mission Tribe and California Tribe.

53. On or about 1970, Marcia Wiezorek and Ramona Harris, employees of the Claims Branch during the time the 1972 California Indian Judgment Fund roll was being prepared, the former employees wrongfully assigned Mary Grijalva as a Diegueño Indian, stating "will not ask for tribe, in 1928 the mother at age 64 did not know, so presumably this person will not know either. Mr. Bill stated that the Indians occupying the area where the mother was born were Gabrielinos." (**Exhibit 11**).

54. However, additional correspondence found on the records of the BIA

state "from our case history we learn that the Bega family has inhabited the Temescal Valley since 1819 and claims to be full blooded Indians of the Shoshone [Gabrielino] Tribe." (**Exhibit 12**).

55. In addition, mission records revealed Mary Grijalva's mother, Maria Guadalupe Arballo Grijalva, and Mary Grijalva's husband, Antonio Bega, were baptized in the Mission San Gabriel, listing them as full Gabrielino Indians. (**Exhibit 13**).

56. Evidently, the BIA failed to review Plaintiff's ancestors 1928 applications of Aurelia Grijalva and Guillermo Grijalva, before assigning Mary Grijalva's tribal affiliation. Furthermore, the BIA notes and statements were made despite the correct tribal affiliation being reflected on many 1968 applications, in which the BIA manually crossed over the tribe which specifically was listed "Gabrielino" and instead listed numerous descendants as "Diegueño." (**Exhibit 14**).

57. By numerous FOIA Requests, the BIA has neglected to provide copies of any research conducted by the BIA Claims Examiners in determining the tribal affiliation to some of the 756 applicants listed on the approved roll as "Unknown Tribe," including Plaintiff's ancestors.

58. Further investigation revealed the special treatment by BIA to some individuals, including the Pacific Regional Director, Ms. Amy Dutschke, whose mother Ramona Burris, application no. 2926 and Grandfather, Clarence Burris, application no. 2925, appear on the Act of 1928 as "Unknown Tribe." However, on June 10, 1985, the BIA issued Ms. Dutschke a CDIB listing her correct tribal affiliation of Miwok, presumably based on other relatives' records. The BIA did not randomly assign Ms. Dutschke to a wrong tribal affiliation. (Exhibit 15). *See Romer v. Evans*, 517 U.S. 620 (1996) 671 F.3d, at 1076, 1095. ("The Equal Protection Clause requires the government have a legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first place").

59. Additional investigation revealed that certain records determining the tribal affiliation and blood degree for Plaintiff's ancestors were grossly mismanaged, falsified, or omitted as BIA response state on a report dated April 13, 2019, "…it is possible that some records Mr. Reyes expected to see had been destroyed as they were considered temporary and subject to disposal."

60. The BIA confirmed in FOIA Request (BIA-2019-01374) dated August 16, 2019, that the agency failed to notify the Archivist of the United States pursuant 44 U.S.C. § 3106, 36 C.F.R. § 1230.14 and 36 C.F.R. 1222.24, on the destruction of federal records as "it has been determined that the BIA has no records responsive to your request" in determining Plaintiff's tribal affiliation.

61. As reaffirmed by the D.C. Circuit in *Cobell v. Salazar*, "[t]he federal government has substantial trust responsibilities toward Native Americans," and that it was "equally clear [that it]… has failed time and again to discharge its fiduciary duties." As a result, the DOI created the American Indian Records Repository and no longer delivers records to the National Archives for storage and preservation.

62. However, the Plaintiff believes the BIA records should be held at the NARA. As described herewith, the BIA historically has failed and continues to fail Native Americans. This is mainly the result of BIA Officials often caught in conflicts of interests, as revealed in numerous FOIA requests conducted by the Plaintiff.

C. Plaintiff's Administrative Appeal and Bureau of Indian Affairs' Final Decision

63. On April 4, 2013, the Plaintiff informed the BIA of the Southern California Agency that the Statement issued as a "Diegueño" was incorrect and mailed supporting documentation to initiate a tribal affiliation and blood quantum correction.

64. On or about May 7, 2013, the Plaintiff received correspondence from the BIA of the Southern California Agency stating they "do not have the authority to

change tribal affiliation[s] stated on the 1928 California Roll."

65. As delegated to the Area Director [Regional Director] of the BIA in accordance to 25 C.F.R § 2.4(a) and pursuant to 25 C.F.R. 62.4(a)(6), on May 10, 2013, the Plaintiff submitted an administrative appeal to the Pacific Regional Office of the BIA. On or about October 28, 2013, the Plaintiff submitted to the BIA five (5) folders full of historical and genealogical information on Plaintiff's ancestors.

66. On January 2018, almost five years after the initial appeal, the Plaintiff submitted a complaint to the Inspector General of the DOI regarding no decision issued on Plaintiff's appeal. On January 19, 2018, the Complaint was assigned OI-HQ-18-0315-R and on February 5, 2018, a duplicate Complaint was assigned as OI-HQ-18-0365-R, and referred to BIA Officials in Washington for a 90-day response.

67. On March 14, 2018, the Plaintiff submitted a Tort Claim addressed to the Office of the Assistant Secretary of Indian Affairs in Washington D.C. and not until April 23, 2018, the Pacific Regional Office of the BIA provided a final decision, denying Plaintiff's request to correct his tribal affiliation and blood degree stating "because your request lacks sufficient documentary evidence to support your change, it will not be forwarded [Office of Indian Services; Division of Tribal Government Services in Washington, D.C.] as originally stated in the February 17, 2016, letter... this decision is final for the Department of the Interior."

68. Plaintiff believes this decision was made intentionally due to Plaintiff's involvement with his tribe, and of course, in retaliation for his extensive research on the records of the BIA at the NARA, including hundreds of FOIA Requests exposing BIA's wrongdoings, primarily in California.

69. The BIA's decision was erroneously made final despite that 25 C.F.R § 62.10(c) provides: "The Director [of the Bureau of Indian Affairs] shall forward the appeal to the Assistant Secretary for final action together with any relevant information or records..."

70. After a decision by the Director under 25 C.F.R. § 62, an individual

aggrieved by that decision could file an action in federal district court under the Administrative Procedures Act, as presumably, the decision is "final agency action," for which federal judicial review is available.

D. Bureau of Indian Affairs Unconstitutional Delegation of Authority on CDIB's

71. It is unclear when the BIA began issuing CDIB's. It appears the CDIB was created at some point for a specific purpose, and then expanded to a general program. However, it is believed that most likely President Franklin Delano Roosevelt's Executive Order 7423 (July 26, 1936) regarding Indian Preference, brought into place.

72. Before 1965, Native Americans were provided an Affidavit of Indian Blood, which is equivalent to a CDIB. It was until a July 26, 1965 memo, by the Associate Commissioner, James E. Officer, that a memo was issued explaining new procedures on issuing a Certificate Degree of Indian Blood. However, the current process the BIA has on the issuance of CDIB's to federally recognized, state-recognized, and non-federally recognized, is unclear, because the BIA has proven to be inconsistent.

73. A CDIB certifies that an individual possesses a specific degree of Indian blood from a United States tribe(s). A deciding Bureau official issues the CDIB. The CDIB is issued so that individuals may establish their eligibility for those programs and services based upon their status as Native American and/or Alaska Natives. A CDIB does not establish membership, and does not prevent an Indian tribe from making a separate and independent determination of blood degree for tribal purposes. However, some tribes do require a CDIB to be included in the federal recognition process and for programs such as "Most Likely Descendant" administered by the California Native American Heritage Commission pursuant Public Resources Code § 5097.98.

74. A CDIB is a key that unlocks educational loans, medical services, employment preference, or other federal benefits unique to Native Americans, and, in some circumstances, even enrollment as a member of a tribal nation. Indeed, any Native American or parent of a Native American can describe numerous situations where a CDIB is requested or required, for the most mundane of activities, such as registering for on-reservation or near-reservation schools, signing up for sports, or seeking college scholarships. *See* 42 C.F.R. § 435.407(a)(5)(ii)(2)(B)(2012) (A CDIB is also an acceptable document to prove United States citizenship for Medicaid eligibility. *See* also 25 C.F.R. § 256. 13(d) (2015) (The BIA will accept a CDIB as proof of tribal membership to apply to the Housing Improvement Program.) *See also* 45 C.F.R. § 286.20 et. seq. (A CDIB is an acceptable document for Tribal TANF Services.) As recognized in 25 U.S.C. § 1679, Indian Health Service, accepts a CDIB for services because "Nothing in this section may be construed as expanding the eligibility of California Indians for health services provided by the Service beyond the scope of eligibility for such health services that applied on May 1, 1986."

75. However, the Agency does not have a model on which roll the CDIB's should be issued. As it appears on Exhibit 1, some CDIB's are issued based on the 1928 Indian roll, while other CDIB's are issued based on the 1948 or 1968 Indian roll. Clearly, the BIA is aware of the lack of regulations for CDIB's, and the Interior Board of Indian Appeals (hereinafter "IBIA") mandate to create them. *See* 44 U.S.C. § 3101; *see also* 5 U.S.C. § 552.

76. The BIA published a draft regulation for CDIB's in 2000, and specifically cited the ruling in *Underwood v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 93 I.D. 13, 14 IBIA 3, January 31, 1986, as the reason to issue them. See 65 Fed. Reg. at 20777. (The BIA did not, however, mention that the IBIA no longer had jurisdiction over CDIB appeals after the 1987 revision to the IBIA's jurisdiction. *See Myles v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs*, 55 IBIA 38 (2012); *Sanders v. Eastern Oklahoma Regional Tribal*

Government Officer, 50 IBIA 307 (2009); *GrosVenor v. Sacramento Area Director, Bureau of Indian Affairs*, 22 IBIA 193 (1992). (IBIA no longer have jurisdiction to review decisions concerning the certification of degree of Indian blood or tribal enrollment decisions).

77. In reviewing the Bureau's practices, the IBIA ruled that the degree of Indian blood of an individual cannot be changed by the Bureau on the basis of "the evidentiary standards set forth in unwritten policy statements" and advised the Bureau to develop and issue regulations, *Underwood v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 93 I.D. 13, 14 IBIA 3, January 31, 1986. In the absence of regulations, the Bureau has been without the authority to invalidate or amend CDIBs issued in error. As a result, there are individuals who do not receive services for which they may qualify and individuals who receive services for which they do not qualify.

78. The BIA has been on notice since 1986 that its CDIB program is of questionable validity, because it operates without regulations issued after public notice and comment under the Administrative Procedures Act. In *Underwood v. Deputy Assistant Secretary-Indian Affairs (Operations)*, this action reveals perhaps the most controversial policy of the BIA related to blood quantum. The BIA did not issue final regulations after *Underwood*. It did, however, make an important procedural change to CDIB administrative appeals.

79. In 1987, the BIA issued a notice in the Federal Register (Notice) that it was revising the regulations concerning enrollment appeals found at 25 C.F.R. § 62. *See Enrollment Appeals*, 52 Fed. Reg. 30159 (Aug. 13, 1987). The stated reason for this change was to create uniform rules for enrollment appeals, where some appeals went through the IBIA administration under 25 C.F.R. Part 2, and others went through the BIA, which caused confusion. Simply put, BIA actions might result in different procedures depending on who appealed the decision.

80. Existing federal laws and regulations require some form of proof of

Indian blood for various purposes. Some of these regulations even expressly refer to CDIB. Unless these laws and regulations are amended to eliminate the need for a method of providing Indian blood or Indian blood degree, uniform standards for issuance, amendments, and denials of CDIB are essential for compliance with the law. *See* 65 Fed. Reg. at 20775 (April 18, 2000) (publishing draft CDIB regulations and discussing the CDIB)

81. It is unclear whether the "instruction manual" included the rules set out in 83 IBIAM Supplement 2, as the IBIA opinion does not specify what manual or section the Deputy Assistant Secretary cited. (The "instruction manual" may be a handbook on tribal enrollment put together by the BIA's Phoenix Area Office and published in 1984). However, the IBIA believed that the main BIA manual contained no such rules.

82. Regardless, the IBIA noted these policies were unpublished and "hidden regulations, available to and known by only the initiated few" in violation of the requirement of notice and comment. *See Indian Affairs Manual* (Part 73—Tribal Government Services is listed as "Reserved.") The IBIA adopted the 1977 American Indian Policy Review Commissions' characterization of unpublished BIA policies as "hidden regulations."

83. In its report to Congress, the Commission sharply criticized the BIA's practice to have unpublished internal policies instead of actual published regulations. Indeed, the BIA was then on notice even before *Underwood* that their policies, including those for CDIBs, were of questionable validity. Indeed, the IBIA also noted that the Deputy Assistant Secretary had admitted in his answer brief that even more BIA offices were unaware of procedures related to CDIBs. *See Department Manual 381 DM1* (Requires that Indian Affairs provide proper documentation of its organizations, functions, policies, and procedures).

84. 83 BIAM Supplement 2 suggests the BIA allows the Indian blood from a non-recognized tribe to be included on a CDIB, if "specific justification is

presented." 83 BIAM Supplement 2, § 9.1 (The same section apparently authorizes the inclusion of blood from a Canadian or terminated tribe as well with "specific jurisdiction.")

85. As described herewith, the BIA policy on the issuance of CDIB's is inconsistent and discriminatory to Native Americans, especially to individuals affiliated with a non-federally recognized tribe, state-recognized tribe, or disenrolled from a tribe. As confirmed in Exhibit 1, the BIA has a history of issuing CDIB's to Native Americans regardless of tribe(s) or Indian status.

86. As originally requested, a CDIB should be issued instead of a Statement Letter because the BIA must comply with their policies and services to Native Americans. Further, there is no indication that Plaintiff's direct ancestor; Mary Grijalva had intended any affiliation with the Diegueño tribe. Therefore, by refusing to acknowledge Plaintiff as a Gabrielino Indian, the BIA is refusing to acknowledge the existence and in fact, it is creating paper genocide of an entire lineage in order to force agreement with the history books and newspapers stating that the original inhabitants of Los Angeles, the Gabrielino people, are "dead and extinct."

87. Plaintiff and family members are entitled to pursue federal recognition, including, to receive services guaranteed by the BIA and the State of California. The BIA's decision to strip hundreds of Gabrielino descendants from misclassification must be corrected.

88. Plaintiff's ancestor, Mary Grijalva, is full sister of Aurelia Grijalva and Guillermo Grijalva. Their lineage comes from the same parents who are Gabrielino Indians living in the historical ancestral lands of the Gabrielino. Nevertheless, the BIA has sabotaged the identity of hundreds of Mary Grijalva Bega descendants for no apparent reason.

89. Thus, this arbitrary and capricious classification "contrary to or involved an unreasonable application of clearly established federal law," because settled Federal law provides "[n]othing in this Act shall be constructed to impair or

prejudice any claim or suit of any Indian tribe against the United States" and the DOI has a "moral obligation of the highest responsibility and trust" according to the U.S. Supreme Court in *Seminole Nation v. U.S.* (1942).

VI. FIRST CLAIM FOR RELIEF

(Injunctive Relieve Pursuant to 5 U.S.C. § 702)

(Right of Review)

90. Plaintiff re-alleges Paragraphs 1 through 89 above and incorporates those paragraphs in their entirety herein.

91. Defendant Amy Dutschke has been delegated the authority to carry out the duties as the Regional Director of the BIA in California.

92. Under 25 U.S.C. section 1679(a)(2), Defendant Dutschke has a statutory duty to issue a CDIB to ensure services for California Indians.

93. Under 25 U.S.C. section 651 et seq., Defendant Dutschke has a statutory duty to administer that duty in a consistent manner among similarly-situated of California Indians.

94. Under 25 U.S.C. section 659, Defendant Dutschke has a statutory duty to maintain an accurate tribal affiliation and blood degree in the Secretary of the Interior California approved Indian rolls.

95. Pursuant to the express directions of Congress in delegating that duty through the Indian Health Care Improvement Act, California Indian Policy Act and the Act of May 18, 1928, Defendant Dutschke must be consistent with BIA policies to California Indians which are eligible for special programs and services provided by the United States fiduciary obligation.

96. Plaintiff Reyes is a California Indian descent, and has requested since 2013 that Defendant Dutschke correct his tribal affiliation, blood degree and issue him a CDIB.

97. Defendant Dutschke has unreasonably, arbitrarily and capriciously

refused to provide to the Plaintiff a CDIB listing him as a Gabrielino Indian.

98. As a result of the ambiguity created by the Defendants' failure to correct Plaintiff's tribal affiliation, blood degree and issue a CDIB, the Plaintiff is adversely affected and aggrieved and is suffering a gross and wrongful deprivation of his rights as a California Indian.

99. As a direct result of the Defendants' failure to correct Plaintiff's tribal affiliation, blood degree and issue a CDIB, their inaction has led to harassment, stalking and other damages to the Plaintiff as described in *Emilio Reyes vs. Lorraine Escobar, et al*., Case No. BC724250 of the Los Angeles Superior Court.

100. Only Congress has authority to terminate the United States' services to California Indians.

101. Defendant's refusal to issue a CDIB with the correct tribal affiliation and blood degree violates Plaintiff's Constitutional rights to equal protection and due process given the Bureau's documented history on the issuance of CDIB policy and of correcting tribal affiliations and blood degrees.

102. The tribal affiliation and blood degree dispute that now confronts the Mary Grijalva and Antonio Bega descendants has its roots in the extremely harsh and almost unbelievably inhumane treatment at the hands of the DOI.

103. The Court should compel Defendants to issue a CDIB to the Plaintiff listing him as a Gabrielino descendant with the correct blood degree.

104. Plaintiff has no other adequate remedy to compel Defendant to respond to Plaintiff's request to receive a CDIB with the correct tribal affiliation and correct blood degree.

105. The conduct of Defendants alleged herein constitutes a denial of full and equal access to Plaintiff's tribal identity.

106. The DOI hidden regulations is inconsistent conduct alleged herein and in violation of the Federal Records Act (44 U.S.C. § 3101), Administrative Procedures Act (5 U.S.C. § 552) and Departmental Manual 381 DM 1.

107. Unless enjoined, the Plaintiff cannot pursue federal recognition in accordance to 25 C.F.R. § 83 because there are no historical records substantiating a connection to the Diegueño tribe. As a result, the BIA would be inconsistent with the Office of Federal Acknowledgement process.

108. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, the BIA will continue to violate the rights of Plaintiff and others entrusted to serve.

109. Unless Defendants are preliminarily and permanently enjoined, Plaintiff will be irreparably harmed in a manner which cannot be adequately compensated in monetary damages.

110. Enjoining Defendant should also avoid a multiplicity of legal actions which may otherwise have to be initiated and prosecuted by the Plaintiff and others regarding further or additional instances of damages, harassing, intimidating, tormenting, embarrassing, dissemination, and stalking.

111. Plaintiff is therefore entitled to declaratory and injunctive relief.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. That the Court reverses Defendant BIA final determination refusing to correct Plaintiff's tribal affiliation and blood degree pursuant 5 U.S.C. § 706.
2. Order that Defendant correct their records to reflect Plaintiff's direct Ancestors Mary Grijalva and Antonio Bega as full Gabrielino Indians pursuant 25 U.S.C. § 659(b).
3. Order that Defendant must issue a CDIB to Plaintiff and to all Mary Grijalva and Antonio Bega descendants.
4. Order that Defendant must continue the CDIB practice and policy to all Native Americans regardless of tribal affiliation, blood degree, or Indian status.

5. Order that Defendant must salvage, retrieve, or reconstruct the records destroyed regarding Plaintiff's tribal affiliation, blood degree and related records and further order that the BIA must provide a statement of the safeguards established to prevent further loss of federal documentation pursuant 36 C.F.R. § 1230.14.
6. Declare that Defendant's actions were inconsistent, arbitrary and capricious.
7. Expedite this action in every way pursuant 28 U.S.C. § 1657(a).
8. Attorney's fees and costs.
9. That the Court grant Plaintiff any and all other relief to which Plaintiff may justly be entitled.

VIII. DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial on all issues triable to a jury.

Date: May 8, 2020

/s/ Emilio Reyes
EMILIO REYES

VERIFICATION

I, EMILIO REYES, have read the foregoing Complaint Injunctive Relief, and attachment of Exhibits 1-15, and know the contents therein. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Verification was executed on May 8, 2020, at San Diego, California.

/s/ Emilio Reyes
EMILIO REYES